

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

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2 EILEEN JEANETTE RODRIGUEZ-VAZQUEZ,  
3 Plaintiff,  
4 v.  
5 PUERTO RICO MANUFACTURING  
6 EXTENSION, INC., et al.,  
7 Defendants.

CLERK'S OFFICE  
U.S. DISTRICT COURT  
SAN JUAN, P.R.

CIVIL NO. 97-2434 (RLA)

9  
10 FIFTH OMNIBUS ORDER  
11 DISPOSING OF OUTSTANDING MOTIONS  
12 SETTING DISCOVERY DEADLINES AND  
13 SCHEDULING PRETRIAL CONFERENCE AND TRIAL

14 The various outstanding motions in this action are hereby  
15 disposed of in this Order. Further, pretrial conference and trial  
16 dates are hereby scheduled.

17 I. DISPOSITIVE MOTIONS

18 The defendants have moved for dismissal of the claims asserted  
19 against them on various grounds. The Court having reviewed the  
20 pleadings as well as the documents in file hereby disposes of these  
21 motions as follows.

22 A. THE COMPLAINT

23 Plaintiff instituted this action against (1) PUERTO RICO  
24 MANUFACTURING EXTENSION, INC. ("PRIMEX") and its executive director,  
25 (2) MIGUEL BURSET; (3) the ECONOMIC DEVELOPMENT  
26 ADMINISTRATION; (4) FOMENTO INDUSTRIAL COMPANY ("PRIDCO") and its

6  
9/10/99  
s/c. J. Clerk  
AO 72  
(Rev 8/82)  
Eileen Rodriguez

(59) no

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1 administrator, (5) JAIME MORGAN-STUBBE, alleging her dismissal from  
2 employment at PRIMEX was in violation of local law as well as  
3 prompted by political animus.

#### 4 B. THE FACTS

5 PRIMEX is a manufacturing technology center established in  
6 Puerto Rico through the initiative of the local Government.

7 PRIMEX began operations in April 1996.

8 Plaintiff was hired by PRIMEX as Marketing Manager effective May  
9 13, 1996.

10 Plaintiff was dismissed from employment with PRIMEX effective  
11 September 27, 1996 when her position was eliminated.

#### 13 C. PRIDCO

14 PRIDCO has moved for dismissal of the claims asserted against it  
15 alleging that plaintiff had no employment relationship with said  
16 entity. Movant submitted several documents in support of its  
17 position which stand unchallenged. Plaintiff's response to the  
18 dismissal request was limited to conclusory and unsubstantiated  
19 allegations which are not sufficient to defeat a proper summary  
20 judgment petition. Santiago v. Canon U.S.A., Inc., 138 F.3d 1 (1<sup>st</sup>  
21 Cir. 1998). Once a defendant submits a duly documented summary  
22 judgment request, the burden shifts to plaintiff to present evidence  
23 sufficient to raise genuine issues of material fact; conclusory  
24 allegations will not do. Cadle Co. v. Hayes, 116 F.3d 957 (1<sup>st</sup> Cir.  
25 1997).  
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1 Therefore, the uncontroverted evidence in the record leads to  
2 the inescapable conclusion that no employment relationship existed  
3 between plaintiff and PRIDCO which excepts codefendant from any  
4 potential liability in this action.

5 Based on the foregoing, the Motion to Dismiss and/or for Summary  
6 Judgment, filed by PRIDCO (docket No. 11)<sup>1</sup> is hereby **GRANTED** and the  
7 complaint filed against PRIDCO is **DISMISSED**. Judgment shall be  
8 entered accordingly.

9  
10 **D. PRIMEX and MIGUEL BURSET**

11 PRIMEX and BURSET moved for abstention as well as dismissal of  
12 various federal causes of action. Additionally, PRIMEX has claimed  
13 Eleventh Amendment immunity.

14 We shall address these arguments *seriatim*.

15 **i. Parallel State Action**

16 Defendants have requested our abstention pending appellate  
17 review of the dismissal, with prejudice, of a similar complaint filed  
18 by plaintiff in parallel state court proceedings. It appearing that  
19 the local proceedings have concluded and it further appearing that  
20 the P.R. Circuit Court of Appeals ruled that the previous dismissal  
21 should have been "without prejudice" this request is **DENIED AS MOOT**.  
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25 <sup>1</sup> See plaintiff's Omnibus Response (docket No. 28) and Reply by  
26 PRIDCO (docket No 47).

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1                                   ii. Pullman Abstention

2           Movants further request abstention under the doctrine  
3 established in R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496  
4 (1941) alleging that plaintiff's claim involves an unsettled issue of  
5 state law. See also Pustell v. Lynn Public Sch., 18 F.3d 50 (1<sup>st</sup>  
6 Cir. 1994).

7           Defendants frame the issue as follows:

8                       In the case at bar, the fundamental question that  
9 surrounds all controversies is: whether the state Public  
10 Service Personnel Act covers an entity such as Primex (and  
11 its officials, such as Burset), thus guaranteeing to all  
12 its employees a right to a pre-termination hearing. This  
13 is an issue of strict state law: it calls for the  
14 interpretation not only of the Public Service Personnel  
15 Act, but also of the statutes, if any, that create entities  
16 such as Primex.

17           Motion to Dismiss... (docket No. 12) at 6.

18           Abstention in this regard depends on the nature of PRIMEX.  
19 However, the record is devoid of any information indicative of this  
20 necessary element. There is no documentation explaining by what  
21 authority it came into existence nor anything relating to its  
22 functions. Faced with this barren scenario the Court is in no  
23 position to rule on this matter nor of appraising the option of  
24 certifying the issue to the P.R. Supreme Court. See Reagan v. Raca  
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1 Mortg., Inc., 135 F.3d 37 (1<sup>st</sup> Cir. 1998); Pyle v. South Hadley Sch.  
2 Comm., 55 F.3d 20 (1<sup>st</sup> Cir. 1995).

3 Accordingly, the petition to abstain on these grounds is **DENIED**.

4 **iii. Eleventh Amendment Immunity**

5 According to defendants, assuming arguendo that PRIMEX is a  
6 "quasi-public corporation" and/or "an operational branch" of the  
7 PUERTO RICO DEVELOPMENT CORPORATION as averred in the complaint, then  
8 PRIMEX would be entitled to the protection of the Eleventh Amendment  
9 immunity. No additional arguments or documentation were provided by  
10 defendants in support of this position.

11 The Eleventh Amendment to the United States Constitution bars  
12 the commencement and prosecution in federal court of suits claiming  
13 damages brought against any state, including Puerto Rico, without its  
14 consent. Torres v. Puerto Rico Tourism Co., 175 F.3d 1 (1<sup>st</sup> Cir.  
15 1999); In re San Juan Dupont Plaza Hotel Fire Litigation, 888 F.2d  
16 940, 942 (1<sup>st</sup> Cir. 1989); Ramírez v. Puerto Rico Fire Service, 715  
17 F.2d 694, 697 (1<sup>st</sup> Cir. 1983); Fernández v. Chardón, 681 F.2d 42, 59  
18 n.13 (1<sup>st</sup> Cir. 1982).

19 The Eleventh Amendment provides:

20 The Judicial power of the United States shall  
21 not be construed to extend to any suit in law or  
22 equity, commenced or prosecuted against one of  
23 the United States by Citizens of another State,  
24 or by Citizens or Subjects of any Foreign State.

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Eleventh Amendment immunity applies even though the state has not been named in the suit. Its protection is extended to governmental entities which are deemed an arm or alter ego of the state. The principal factors to weigh in determining whether or not a particular entity qualifies as an alter ego of a state, are whether the agency exercises a governmental or a proprietary function and whether an adverse judgment will be satisfied from public or separate agency funds. Royal Caribbean Corp. v. Puerto Rico Ports Authority, 973 F.2d 8, 9-10 (1st Cir. 1992); In re San Juan Dupont Plaza Hotel Fire Litigation, 888 2d at 943-44. In examining the nature of the agency's function, we must scrutinize it within the specific context of the claims asserted in the complaint. Royal Caribbean.

Additionally, the analysis should include consideration of "the agency's degree of autonomy; the power of the agency to sue and be sued and enter into contracts; whether the agency's property is immune from state taxation and whether the state has insulated itself from responsibility for the agency's operations." M/V Manhattan Prince, 897 F.2d 1, 9 (1st Cir. 1990) (citing Ainsworth Aristocrat International Pty., Ltd. v. Tourism Co. of Puerto Rico, 818 F.2d 1034, 1037 (1st Cir. 1987)).

The protection afforded by the Eleventh Amendment to governmental entities is not automatic. Its applicability depends on a number of factors including the degree of administrative autonomy and fiscal independence enjoyed by the entity which, in this

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1 particular case, remain unknown to the Court. Absent evidence of the  
2 relevant facts essential to conducting a proper analysis, the Court  
3 is unable to make a determination regarding the applicability of the  
4 Eleventh Amendment immunity to the petitioning defendant.

5 Accordingly, PRIMEX's request for dismissal based on Eleventh  
6 Amendment immunity is **DENIED**.

7  
8 **iv. Claims pursuant to § 1983**

9 Defendants further contend that dismissal of  
10 the 42 U.S.C. § 1983 claims is proper in that neither PRIMEX nor  
11 BURSET are "persons" within the meaning of the statute and that  
12 plaintiff has no property interest in her position.

13 It is evident that neither PRIMEX nor the other entities named  
14 as defendants herein are "persons" within the meaning of this statute  
15 and therefore, are not proper parties to this type of suit. See  
16 Johnson v. Rodriguez, 943 F.2d 104, 108 (1<sup>st</sup> Cir. 1991). Therefore,  
17 no § 1983 cause of action lies against them.

18 As to whether or not plaintiff may pursue a § 1983 cause of  
19 action against BURSET a different approach is required. In this  
20 regard, a distinction must be made between claims advanced against  
21 codefendant in his individual capacity versus those made against him  
22 in his official capacity.

23 Actions asserted against government employees in their official  
24 capacity are deemed actions against the state since the real party in  
25 interest is the government and not the official and therefore,  
26

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1 subject to Eleventh Amendment protection. Hafer v. Melo, 502 U.S.  
2 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Suits against officers in  
3 their official capacity for damages are tantamount to actions  
4 directly against the state and barred by the aforementioned immunity.  
5 Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304,  
6 105 L.Ed.2d 45 (1989).

7 On the other hand, BURSET is subject to individual liability  
8 under § 1983 provided plaintiff is able to establish the necessary  
9 elements of a cause of action, i.e., deprivation of a federal right  
10 "by a person under color of state law." Barrios v.  
11 AEELA, 84 F.3d 487, 491 (1<sup>st</sup> Cir. 1996). Any judgment entered against  
12 BURSET in these proceedings pursuant to § 1983 would have to be paid  
13 by him personally unless he is covered by P.R. Laws Ann. tit. 32 §  
14 3085 (1990) in which case judgment would be satisfied from Puerto  
15 Rico funds.  
16

17 There is no information available in the record at this time for  
18 the Court to make a determination regarding the suitability of  
19 a § 1983 claim against BURSET in his personal capacity nor whether or  
20 not plaintiff held a proprietary interest in her position at PRIMEX.  
21 See King v. Town of Hanover, 116 F.3d 965, 969 (1<sup>st</sup> Cir. 1997).

22 Accordingly, the § 1983 claim asserted against PRIMEX and the  
23 ECONOMIC DEVELOPMENT ADMINISTRATION<sup>2</sup> are hereby **DISMISSED**.  
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26 <sup>2</sup> The remaining non-individual defendants.



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1 It is further ORDERED that the request to dismiss the § 1983  
2 claim against BURSET is DENIED.

3 **v. Claim pursuant to § 1985**

4 Absent any allegation<sup>3</sup> of conduct justifying a conspiracy,  
5 defendants' request to dismiss the claims asserted under  
6 42 U.S.C. § 1985 is GRANTED. See Romero Barcelo v. Hernandez  
7 Agosto, 75 F.3d 23 (1<sup>st</sup> Cir. 1996) (class based discriminatory animus  
8 and overt acts must be identified).

9 Accordingly, the § 1985 claims asserted in the complaint are  
10 DISMISSED.  
11

12 **vi. COBRA**

13 Absent opposition and it appearing that defendants' arguments  
14 are correct, the claims asserted in the complaint under the  
15 Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C.  
16 § 1161 et seq. are hereby DISMISSED.

17 **E. MORGAN-STUBBE & ECONOMIC DEVELOPMENT ADMINISTRATION**

18 Codefendants JAIME MORGAN-STUBBE and the ECONOMIC DEVELOPMENT  
19 ADMINISTRATION have moved for dismissal based on abstention and  
20 Eleventh Amendment grounds.  
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22 **i. Abstention**

23 The arguments regarding abstention pending parallel proceedings  
24 as well as those based on the Pullman doctrine having been already  
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26 <sup>3</sup> Plaintiff did not address this argument in her opposition.

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1 disposed of in this Order and codefendants having failed to add any  
2 further arguments to justify their petition, this request is **DENIED**.

3 **ii. Eleventh Amendment**

4 The only argument advanced by the ECONOMIC DEVELOPMENT  
5 ADMINISTRATION to claim Eleventh Amendment protection is that the  
6 "there is no question about [it] being a governmental agency of the  
7 Commonwealth of Puerto Rico." Motion to Dismiss (docket No.  
8 15) at 5. However, this conclusory statement by itself is  
9 insufficient for the Court to make a determination on this issue.  
10

11 Accordingly, the motion to dismiss the claims against the  
12 ECONOMIC DEVELOPMENT ADMINISTRATION based on Eleventh Amendment  
13 coverage is **DENIED**.

14 **F. CONCLUSION**

15 Based on the foregoing, the Motion to Dismiss and/or for Summary  
16 Judgment, filed by PRIDCO (docket No. 11);<sup>4</sup> the Motion to Dismiss...  
17 filed by PRIMEX and BURSET (docket No. 12)<sup>5</sup> and the Motion to Dismiss,  
18 filed by JAIME MORGAN-STUBBE and the ECONOMIC DEVELOPMENT  
19 ADMINISTRATION (docket No. 15)<sup>6</sup> are **GRANTED** but limited to:  
20

21 \_\_\_\_\_  
22 <sup>4</sup> See Omnibus Response... filed by plaintiff (docket No 28) and  
23 Reply... filed by PRIDCO (docket No. 47).

24 <sup>5</sup> See also Reply... filed by PRIMEX and BURSET (docket No;. 38).

25 <sup>6</sup> See also Reply... filed by JAIME MORGAN-STUBBE (docket No.  
26 45). The Informative Motion filed by codefendant (docket No. 43) is  
**NOTED**.

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1 The claims asserted against PRIDCO are hereby **DISMISSED**.

2 The 42 U.S.C. § 1983 claims asserted against PRIMEX and the  
3 ECONOMIC DEVELOPMENT ADMINISTRATION are hereby **DISMISSED**.

4 The 42 U.S.C. § 1985 claims asserted in the complaint are hereby  
5 **DISMISSED**.

6 The COBRA claims asserted in the complaint are hereby **DISMISSED**.

7  
8 **II. CURRENT STATUS OF CODEFENDANT**

9 The Special Appearance by the Secretary of Justice of the  
10 Commonwealth of Puerto Rico (docket No. 41) advising that codefendant  
11 the ECONOMIC DEVELOPMENT ADMINISTRATION had ceased to exist and that  
12 all its "functions, powers and duties" have been transferred to  
13 PRIDCO is **NOTED**.<sup>7</sup>

14 **III. PLAINTIFF'S LEGAL REPRESENTATION**

15 The Motion Submitting Plaintiff's Address and Renewing Leave to  
16 Withdraw, filed by MARLENE APONTE CABRERA, ESQ. (docket No. 58) is  
17 **GRANTED**.

18 Accordingly, MS. APONTE CABRERA is relieved from further  
19 participation in his case.<sup>8</sup>

20 It is further ORDERED that until new counsel enters an  
21 appearance on plaintiff's behalf copy of this Order as well as all  
22

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23  
24 <sup>7</sup> The Informative Motions filed by the Secretary of Justice  
25 (dockets No. 42 and 44) are **NOTED**.

26 <sup>8</sup> See also Motion for Leave to Withdraw... (docket No. 54).

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1 motions and orders filed in this case hereinafter shall be served  
2 directly to plaintiff as follows:

3 EILEEN JEANNETTE RODRIGUEZ VAZQUEZ  
4 5546 NW 101 Court  
5 Miami, Fla. 33178

6 **IV. DISCOVERY**

7 It appearing that plaintiff has had ample opportunity to procure  
8 new legal representation in that she has been on notice of her  
9 attorney's wish to withdraw since early this year, discovery in this  
10 case shall proceed according to the following deadlines.

11 **11/1/99** Deadline for parties to propound written discovery.  
12 **12/15/99** Deadline for plaintiff to identify expert witnesses.  
13 **1/14/2000** Deadline for defendants to identify expert witnesses  
14 **1/14/2000** Deadline for plaintiff's expert witness reports.  
15 **1/31/2000** Deadline for depositions of parties and fact  
16 witnesses.  
17 **2/15/2000** Deadline for defendant's expert witness reports.  
18 **2/29/2000** Deadline for depositions of all expert witnesses.

19 **V. PRETRIAL CONFERENCE AND TRIAL**

20 A **PRETRIAL/SETTLEMENT CONFERENCE**, to be held before the  
21 undersigned,<sup>9</sup> is hereby scheduled for **April 4, 2000 at 2:30 p.m.**  
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25 <sup>9</sup> The parties shall contact the undersigned's chambers to verify  
26 where the conference will be held.

1 A Proposed Joint Pretrial Order<sup>10</sup> shall be filed on or before  
2 March 28, 2000, and shall contain the following:

3 **I. Nature of the Case**

4 A statement of the nature of the case agreed upon by  
5 all parties which shall include issues of jurisdiction. In the  
6 event that the parties cannot agree upon a single description,  
7 separate versions shall be submitted.

8 **II. Theories of the Parties**

9 Each party shall present concisely its pertinent legal  
10 theories including applicable citations to statutes and caselaw.  
11 Counsel are directed to fully disclose all trial issues since  
12 the Proposed Joint Pretrial Order will supersede the pleadings  
13 in establishing the issues to be heard and considered at trial.

14 **III. Admitted Facts**

15 The parties shall provide a comprehensive listing of  
16 all admitted or stipulated facts.

17 **IV. Contested Facts**

18 The parties shall provide a listing of contested  
19 facts.

20 **V. List of Exhibits**

21 This section shall contain a listing of all exhibits  
22 which have been pre-marked/numbered. Each exhibit shall be  
23

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24 <sup>10</sup> A courtesy copy to be delivered directly to the chambers of  
25 the undersigned.  
26

1 identified by a descriptive title as well as its identification  
2 number. The parties shall indicate those exhibits, if any,  
3 which are not objected to by opposing counsel.

#### 4 VI. Depositions

5 The party wishing to use deposition testimony at trial  
6 shall list the depositions. Additionally, designations and  
7 objections shall be submitted in accordance with the  
8 undersigned's STANDING ORDER FOR CIVIL TRIALS issued on **February**  
9 **10, 1994.**

#### 11 VII. Witnesses and Interpreters

12 Each party shall identify witnesses to be presented at  
13 trial and include a brief, one paragraph, offer of proof.  
14 Additionally, the parties shall specifically identify those  
15 witnesses who will need the services of a court-certified  
16 interpreter during trial.

#### 17 VIII. Expert Witnesses and Interpreters

18 Each party shall list its expert witnesses and include  
19 his/her curriculum vitae and an offer of proof. If an expert  
20 report has been produced, the report shall be submitted in  
21 conjunction with the offer of proof. Additionally, the parties  
22 shall specifically identify those experts who will need the  
23 services of a court-certified interpreter during trial.  
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**IX. Itemized Statement of Special Damages**

In anticipation that the issue of special damages may arise, an itemized statement of special damages shall be incorporated into the Proposed Joint Pretrial Order. The party or parties not in agreement with the proposed statement shall include its/their opposition in this section.

**X. Estimated Length of Trial**

Parties shall indicate the estimated length of trial. The Proposed Joint Pretrial Order may be modified by this Court only upon a showing of good cause.

**JURY TRIAL**

**TRIAL** in this action hereby set for **April 11, 2000 at 9:30 a.m.**

**STANDING ORDER**

The parties shall file a TRIAL BRIEF, PROPOSED JURY INSTRUCTIONS, PROPOSED VOIR DIRE and PROPOSED VERDICT FORM<sup>11</sup> no later than **April 7, 2000** in accordance with the undersigned's STANDING ORDER FOR CIVIL TRIALS issued on **February 10, 1994**.

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<sup>11</sup> Courtesy copies of all these documents shall be delivered directly to the chambers of the undersigned.

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1 The parties shall make the necessary arrangements with the  
2 courtroom deputy clerk to have the evidence marked prior to trial.<sup>12</sup>

3 IT IS SO ORDERED.

4 San Juan, Puerto Rico, this 9<sup>th</sup> day of September, 1999.

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7 RAYMOND L. ACOSTA  
8 United States District Judge  
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25 <sup>12</sup> The parties shall furnish the undersigned an additional copy  
26 of all documents intended to be presented as evidence at trial.



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**SUMMARY OF DEADLINES AND SETTINGS**

11/1/99	Deadline for parties to propound written discovery.
12/15/99	Deadline for plaintiff to identify expert witnesses.
1/14/2000	Deadline for defendants to identify expert witnesses
1/14/2000	Deadline for plaintiff's expert witness reports.
1/31/2000	Deadline for depositions of parties and fact witnesses.
2/15/2000	Deadline for defendant's expert witness reports.
2/29/2000	Deadline for depositions of all expert witnesses.
3/28/2000	Deadline for filing JOINT PRETRIAL ORDER
4/4/2000	PRETRIAL/SETTLEMENT CONFERENCE at 2:30 p.m.
4/7/2000	Deadline for filing TRIAL BRIEF, PROPOSED JURY INSTRUCTIONS, PROPOSED VOIR DIRE and PROPOSED VERDICT FORM
****	Parties to mark evidence prior to trial
****	Parties to provide the court copy of all documents intended to be presented as evidence at trial.
4/11/2000	JURY TRIAL at 9:30 a.m.